No. 24-50726

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

U.S. SECURITIES AND EXCHANGE COMMISSION,
Plaintiff-Appellee,

v.

IAN BALINA,
Defendant-Appellant.

BRIEF FOR THE BLOCKCHAIN ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF APPELLANT AND REVERSAL

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CERTIFICATE OF INTERESTED PERSONS

Per Circuit Rule 28.2.1, the Blockchain Association certifies that—in addition to the persons listed on the certificate of interested persons submitted by Appellant—the following listed persons have an interest in the outcome of this case. These representations are made in order for the judges of this Court to evaluate possible disqualification or recusal.

1. Blockchain Association, *Amicus Curiae*
2. Thomas R. McCarthy, Counsel for *Amicus Curiae*
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4. J. Abraham Sutherland, Counsel for *Amicus Curiae*
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Dated: January 9, 2025 */s/ Thomas R. McCarthy*

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INTEREST OF AMICUS CURIAE[1]

The Blockchain Association is the leading membership organization dedicated to promoting a pro-innovation policy environment for the digital-asset economy. The Association endeavors to achieve regulatory clarity and to educate policymakers, regulators, courts, and the public about how blockchain technology can create a more secure, competitive, and consumer-friendly digital marketplace. The Association represents over 100 member companies reflecting the wide range of the blockchain industry, including software developers, infrastructure providers, exchanges, custodians, investors, and others supporting the public blockchain ecosystem.

The Association has a strong interest in this action. The district court's decision, if upheld, would resurrect a now-discredited approach to the extraterritorial application of U.S. law. The district court's approach to extraterritoriality is one that the Supreme Court has criticized as resulting in the unpredictable and inconsistent application of U.S. law to foreign conduct. The district court's decision renders predominantly foreign conduct subject to U.S. securities law, and allows the Securities and Exchange Commission to assert its jurisdiction over digital asset companies conducting business anywhere in the world in situations that are predominantly foreign. Extending the SEC's

[1] Per Federal Rule of Appellate Procedure 29(a)(4)(E), the Association certifies that no party's counsel authored this brief in whole or in part, no party or a party's counsel contributed money that was intended to fund preparing or submitting this brief, and no person other than the Association, its members, or its counsel contributed money that was intended to fund preparing or submitting the brief. All parties consent to the filing of this amicus brief.

unclear digital asset policies beyond its proper jurisdiction would have devastating effects on the global blockchain ecosystem and the Association's members. The Association has an interest in promoting regulatory clarity and protecting its members from the harm the district court's decision would impose.

More broadly, the Association has an interest in a clear and predictable application of the laws and regulations that affect its members globally. Under the district court's reasoning, provisions of the U.S. securities laws that are undisputedly not extraterritorial could potentially govern vast swathes of conduct that occur on foreign territory based on the use of global social media networks—simply because social media may reach some undefined number of Americans. That approach would dramatically expand the SEC's regulatory jurisdiction and largely negate the presumption against extraterritoriality. In the spirit of maintaining separation of powers, the Association has an interest in ensuring that the executive and judicial branches respect Congress's decision not to extend domestic law to foreign conduct.

INTRODUCTION & SUMMARY OF THE ARGUMENT

This case presents an important opportunity to re-establish the Supreme Court's framework limiting the application of domestic laws to foreign conduct. Despite Congress's clear intent that the SEC's regulatory authority should not apply extraterritorially, the district court essentially gave the SEC worldwide enforcement powers. It held that the SEC could bring an enforcement action against the defendant for offers and promotions of digital assets that he made in Europe, simply because he

used global social media platforms like "YouTube, X, Instagram, Discord, Telegram, [and] Google." The district court reasoned that because those social media platforms allowed the defendant to reach Americans (and everyone else), they rendered his conduct domestic—even though he made the offers and promotions while in a foreign country, declared that the offering was in the United Kingdom, disclaimed availability to U.S. investors, used an Estonian company to conduct it, and held live marketing events abroad. The district court's extraterritoriality analysis did not even depend on the content of the social media posts or any terms and conditions specific to the defendant. The district court also held that the SEC could regulate online sales of digital assets from foreign countries, so long as a minority of recipients ended up being Americans, even where the conduct that made those sales irrevocable occurred overseas. Because it is effectively impossible to avoid reaching Americans in the global internet age, the district court's almost exclusive reliance on the defendant's mere use of social media and on the fact that a minority of investors were located in the U.S. was improper and its rule would let the SEC regulate digital assets—and any other alleged securities—everywhere on earth.

But that is exactly what Congress did not want and what the Supreme Court has repeatedly admonished against. Generally, "United States law governs domestically but does *not* rule the world." *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 454 (2007) (emphasis added). In other words, the party bringing suit must establish that "'the conduct relevant to the statute's focus occurred *in the United States*.'" *Abitron Austria*

GmbH v. Hetronic Int'l, Inc., 600 U.S. 412, 418 (2023) (emphasis added). But the SEC did not satisfy that requirement here, where the defendant's conduct relevant to the statute's focus was in foreign territory. Because the defendant used certain globally available internet channels to reach in the most efficient manner its targeted non-U.S. audience, the defendant's conduct had the effect of the offering being visible to certain persons in the United States. In pinning its decision on this collateral effect, the district court effectively adopted a novel methodology—that the Supreme Court has squarely rejected—about the "effects" of the defendant's conduct. *Morrison v. Australia National Bank*, 561 U.S. 247, 257-62 (2010); *see also Abitron*, 600 U.S. at 439 (Sotomayor, J., concurring in the judgment) (offering alternative test, rejected by the majority, based on whom the statute was designed to "protect").

The district court's decision threatens to harm the global digital asset marketplace and world affairs. The decision not only gives extraterritorial effect to the SEC's view of what constitutes an illegal "offer," "promotion," or "sale," but also extends the SEC's shifting and unclear views regarding whether an offering of a digital asset is an offering of a security instead of a commodity or some other type of instrument outside its jurisdiction. The practical effect of affirming would be to bless SEC jurisdiction over foreign conduct in this developing area, reducing the presumption against extraterritoriality to a "craven watchdog," "retreat[ing] to its kennel whenever [a social-media account and a single American investor] is involved in the case." *Morrison*, 561 U.S. at 266. It would especially devastate digital asset developers—many of whom have

been forced out of the United States by an SEC that has targeted the digital asset industry, only to find themselves now potentially subject to its authority wherever they go—and introduce crippling uncertainty. It would also offend the separation of powers and invite unforeseen foreign policy challenges from other nations encouraged to enact their own broad extraterritorial regulations in response to the SEC's example.

This Court should reverse.

ARGUMENT

I. The district court's holding that the securities laws applied to the foreign conduct at issue in this case violates Supreme Court precedent.

Under the presumption against extraterritoriality, the government's claims in this case should have been able to proceed only if "the conduct relevant to the statute's focus occurred *in the United States*." *Abitron*, 600 U.S. at 418 (emphasis added). It is insufficient if the effects of the defendant's conduct were felt in America or the statute was intended to protect Americans. Yet here, the conduct was foreign—the defendant offered and promoted digital assets from abroad via social media, and did not seek to target Americans—but the district court nonetheless held that the government's claims could proceed because that conduct could reach and thus have effects on potential American investors, whom the statute was designed to protect. The district court erred.

A. Supreme Court precedent requires domestic conduct, not domestic effects or protection.

Generally, a statute passed by Congress "governs domestically but does not rule the world." *Microsoft*, 550 U.S. at 454. This commonsense principle of construction, known as the presumption against extraterritoriality, is deeply rooted in our nation's

history and tradition of statutory interpretation. *Hewlett-Packard Co. v. Quanta Storage*, 961 F.3d 731, 736 (5th Cir. 2020) (citing founding-era authority and English cases back to 1583); *see, e.g.*, *United States v. Palmer*, 3 Wheat. 610, 630-33 (1818) (Marshall, C.J.). It rests on "the commonsense notion that Congress generally legislates with domestic concerns in mind." *Smith v. United States*, 507 U.S. 197, 204 n.5 (1993). Its primary function is to channel questions about the extraterritorial scope of U.S. law to Congress, "'help[ing] ensure that the Judiciary does not erroneously adopt an interpretation … that carries foreign policy consequences not clearly intended by the political branches.'" *United States v. Vasquez*, 899 F.3d 363, 373 (5th Cir. 2018); *WesternGeco LLC v. ION Geophysical Corp.*, 585 U.S. 407, 412 (2018) (citing Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* §43, p. 268 (2012) (tracing the presumption to the medieval maxim *Statuta suo clauduntur territorio, nec ultra territorium disponunt*)). Thus, like many canons of construction, the presumption reinforces the separation of powers by protecting legislative prerogatives.

The Supreme Court "has established a two-step framework for deciding questions of extraterritoriality." *WesternGeco*, 585 U.S. at 413. Step one is straightforward: "When a statute gives no clear indication of an extraterritorial application, it has none." *Morrison*, 561 U.S. at 255. Most statutes give no clear indication of an extraterritorial application, so they may be applied only domestically. Step two then asks "'whether the case involves a domestic application of the statute.'" *WesternGeco*, 585 U.S. at 413. Critically, for a party to establish a domestic application at

step two, it must show that "'the *conduct relevant to the statute's focus* occurred in the United States.'" *Abitron*, 600 U.S. at 418 (quoting *Nestlé USA, Inc. v. Doe*, 593 U.S. 628, 633 (2021)). If the "conduct relevant to the statute's focus" occurred elsewhere, then the case presents an impermissible foreign application of the statute and may not proceed. *Id.* at 424. For example, if a trademark-infringer makes and markets a trademark in foreign territory, a claim challenging that infringement is impermissibly foreign—even if it affects some Americans—and must be dismissed absent further "conduct" in America. *Id.* at 421-25.

In establishing this two-step framework, the Supreme Court has repeatedly rejected the tempting notion that a statute may apply to conduct because the "effects" of the conduct are felt in the United States or the statute seeks to "protect" Americans. In *Morrison*, the Court repudiated a "conduct and effects" test for extraterritoriality that the Second Circuit had long applied specifically to securities cases. *See* 561 U.S. at 261. As relevant here, the Second Circuit used to decide whether a securities statute applied in part based on "whether the wrongful conduct had a substantial effect in the United States or upon United States citizens." *Id.* at 257. The Supreme Court rejected this "effects" inquiry as "judicial-speculation-made-law" lacking any "textual or even extratextual basis" and being "complex in formulation and unpredictable in application." *Id.* at 256-61. Instead of asking how the conduct affected Americans, *Morrison* refocused the inquiry to *where the conduct happened*. *Id.* at 266-70. Thus, in that case, because the "purchases and sales" underlying the securities fraud claims did not

themselves occur in America, that "*foreign location* of the transaction" rendered the claims beyond the statute's reach, even though the conduct at issue affected Americans. *Id.* at 268 (emphasis added).

More recently, in *Abitron*, the Supreme Court again rejected the position that a claim was domestic solely because the underlying statute sought to protect Americans from foreign acts that had "'impacts within the United States.'" 600 U.S. at 417. The Tenth Circuit in that case had held that an American plaintiff satisfied step two where it brought a trademark-infringement claim against foreign manufacturers who committed infringing acts worldwide. *Id.* at 415-17. The Tenth Circuit reasoned that the foreign manufacturers' infringing acts all had "'impacts within the United States'"—like American consumer confusion and harm to the American trademark owner—so the statute reached them. *Id.* at 417. The Supreme Court disagreed. It emphasized that "'plaintiffs must establish that the *conduct relevant to the statute's focus* occurred in the United States'" regardless of whether the statute protected Americans. *Id.* at 418 (quoting *Nestlé*, 593 U.S. at 633). The relevant conduct in *Abitron* was the defendants' "infringing 'use in commerce,'" not the impacts felt within the United States, so the Supreme Court vacated the Tenth Circuit's decision for reconsideration under the corrected standard. *Id.* at 428.

Justice Sotomayor's *Abitron* concurrence-in-the-judgment attempted to shift the inquiry away from the underlying "conduct," but the Court majority sharply disagreed. Justice Sotomayor took the position that because the "focus" of the trademark-

infringement statute was "protection against consumer confusion," claims could be allowed against "foreign infringement activities [when] there is a likelihood of consumer confusion in the United States." *Id.* at 437 (Sotomayor, J., concurring in the judgment). The majority called Justice Sotomayor's protection-based approach "wrong." *Id.* at 424. Instead of asking whom the statute protects, the Court explained, it must ask where "'the conduct relevant to the statute's focus'" occurred. *Id.* "Under Justice Sotomayor's standard," the Court explained, "almost any claim involving exclusively foreign conduct could be repackaged as a 'domestic application'" because most foreign conduct reaches and affects Americans. *Id.* at 425. The Court thought that approach would give statutes an "untenably broad reach that undermines our extraterritoriality framework." *Id.* at 424; *see also id.* at 424-26. In the end, Justice Sotomayor's concurrence characterized the majority as having adopted a "conduct-only test" under which "no statute can reach relevant conduct abroad, no matter the true object of the statute's solicitude." *Id.* at 439 (Sotomayor, J., concurring in the judgment). Notably, the majority did not dispute this characterization.

Finally, the Supreme Court has also clarified that it is not sufficient if merely *some* of the conduct occurred in the United States. "[T]he presumption against extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever some domestic activity is involved in the case." *Morrison*, 561 U.S. at 266. Indeed, "it is a rare case of prohibited extraterritorial application that lacks all contact with the territory of the United States." *Id.* Courts have therefore demanded that the domestic

conduct go to the statute's *focus*. *Abitron*, 600 U.S. at 418. And they have demanded that the domestic conduct not be outweighed by "predominantly" foreign conduct. *Parkcentral Glob. Hub Ltd. v. Porsche Auto. Holdings SE*, 763 F.3d 198, 216 (2d Cir. 2014). In *Morrison*, for example, it was insufficient that some of the defendants' conduct, including its deceptive acts, occurred in America, because the sales at issue in that case—which were the conduct relevant to the statute's *focus*—themselves occurred on foreign soil. 561 U.S. at 266-68, 273. The "foreign location of the transaction," the Court explained, "establishes (or reflects the presumption of) the Act's inapplicability." *Id.* at 268.

B. The district court ruled for the government based on domestic effects and protection, not domestic conduct.

The district court took a different approach. The district court held, and everyone agreed, that the government could not satisfy step one because none of the securities law provisions here—those governing offers, promotions, and sales of securities—clearly indicated extraterritorial application. *SEC v. Balina*, 2024 WL 2332965, at *5 (W.D. Tex. May 22). But then the district court held that the government satisfied step two as to all of the defendant's relevant conduct. As to his offers and promotions, it held that the government satisfied step two because the defendant used social media platforms available and based in the United States—even though the defendant was in Europe when he made the offers and promotions, offered and promoted a digital asset made by a Cayman Islands company, said that the offering was in the United Kingdom, and used an Estonian company to conduct it. *Id.* at *7. The

district court did not even further analyze the content of the posts and the terms, conditions, and disclaimers that governed the offering, but instead held that the bare availability of the posts on social media to Americans rendered them domestic. *Id.* at *6-*7. As to his sales, it held that the government satisfied step two because a minority of recipients of the digital assets that the defendant sold were in America, although the defendant was on foreign soil and the sales became irrevocable based on the defendant's foreign action. *Id.* at *7-*8. It erred on both fronts.

Offers and Promotions. The district court held that the government satisfied step two as to the defendant's offers and promotions of digital assets—which the SEC believes are securities—that occurred on foreign soil simply because they were made on global social media platforms. *Id.* at *6. Specifically, the district court held that when someone in *Europe* offers or promotes a digital asset token made by a *Cayman Islands* company on global social media platforms like "YouTube, X, Instagram, Discord, Telegram, [and] Google," those offers and promotions are domestic because the platforms are "based" or "available in" America and at least one social media group included a minority of U.S. investors (apparently between "four" and "nine" total, though only *two* were identified) who could read the offers and promotions. *Id.* The district court did not even analyze whether the defendant intended the offering to apply to a foreign jurisdiction or whether he disclaimed U.S. investor participation. Because "the statute intends to protect" American investors, and social media reaches American investors, the district court held that the securities laws applied regardless of the

overwhelmingly foreign facts. *Id.* This outcome, the district court reasoned, best accorded with "congressional intent" and "public policy." *Id.* at *6, *8.

The district court's analysis was fundamentally flawed. First, it failed the simplest requirement of *Abitron* because it never confirmed that the conduct relevant to the statute's focus occurred in the United States. *Abitron* said that the "*ultimate question* regarding permissible domestic application turns on the location of the conduct relevant to the [statute's] focus." 600 U.S. at 422 (emphasis added); *accord id.* at 418. But here, the district court did not identify conduct relevant to the statute's focus that occurred in the United States. Instead, it said that "the object at the focus of a statute does not only include the conduct it seeks to regulate, but also those parties and interests that the statute intends to protect." *Balina*, 2024 WL 2332965, at *6. It therefore discounted that "conduct related to the promotion, offer, and sale of SPRK … occurred outside the United States," and focused on how that conduct affected Americans' interests. *Id.* at *7. And although it observed that some of the social media companies were "based" in the United States, it never explained how that fact about background non-parties related to any "conduct," let alone the conduct relevant to the statute's "focus." *Abitron*, 600 U.S. at 418, 422.

In other words, the district court focused its analysis on the "effects" of the conduct, just like the old Second Circuit test that *Morrison* rejected. 561 U.S. at 258, 261. *Morrison* condemned the Second Circuit's approach of deciding whether a claim was domestic based on the underlying conduct's "effect on American securities markets or

investors." *Id.* at 257. It offered a "damning indictment" of that approach, and ultimately concluded that it made the extraterritoriality doctrine depend on "matters of policy." *Id.* at 258-59. The district court's resurrection of the *Morrison* effects-based approach is especially inappropriate in the securities law context where *Morrison* rejected it.

In fact, the district court's holding is all but incompatible with *Morrison*'s specific holding that the securities laws' provisions governing fraudulent purchases and sales *cannot apply* when they are made in foreign countries. If the provisions regulating offers and promotions like those at issue here do not require a nexus with *any* underlying domestic transaction (completed or not) then they would have broader application to foreign conduct than the anti-fraud provision discussed in *Morrison*, even though the provisions were enacted as part of the "same comprehensive regulation of securities trading." *Id.* at 268; *compare* 15 U.S.C. §77e(a)(1) (sales of unregistered securities), *with id.* §§77e(c) (offers of same), 77q(b) (promotions). To the extent such provisions have ever been understood to regulate differing scopes of foreign conduct, the opposite has generally been true. *See SEC v. Ripple Labs*, 2022 WL 762966, at *12 (S.D.N.Y. Mar. 11) ("'[I]t is well-settled in this Circuit that the anti-fraud provisions of American securities laws have broader extraterritorial reach than American filing requirements.'").

The district court then adopted reasoning that resembled the test advocated by Justice Sotomayor's *Abitron* concurrence, as if the *Abitron* majority did not reject it. The district court reasoned that the securities laws provisions governing promotions and

offers sought to "protect United States investors and United States financial markets from the offer of unregistered securities," so they should apply to offers and investments that reach investors in the United States, even if all of the defendant's *conduct* originated outside the United States. *Balina*, 2024 WL 2332965, at *6-*7; *cf. Abitron*, 600 U.S. at 437-38 (Sotomayor, J., concurring) (reasoning that the statute sought "protection against consumer confusion," so it should apply when the conduct reaches consumers in the United States, even "when the conduct originates abroad"). The *Abitron* majority called this approach "wrong" and said (presciently) that under this methodology, "almost any claim involving exclusively foreign conduct could be repackaged as a 'domestic application'" because most foreign conduct reaches and affects Americans. *Id.* at 424-26.

In many ways, the district court takes the approaches rejected by *Morrison* and *Abitron even further*. Even the Second Circuit's old effects analysis also took into consideration (albeit to a sometimes-unclear extent) "'whether the wrongful conduct occurred in the United States.'" *Morrison*, 561 U.S. at 257. And even Justice Sotomayor's approach appeared to be limited to claims involving infringement of trademarks only if they were held by "U.S. trademark owners," thereby avoiding global jurisdiction over other trademark-infringement claims that reached American consumers. *Abitron*, 600 U.S. at 441 (Sotomayor, J., concurring in the judgment). But the district court's holding here requires even less connection to the United States and makes the SEC's jurisdiction effectively unlimited. In today's internet age, nearly every offer and promotion like the

defendant's will be on global social media; and available in the United States; and thus some Americans will inevitably read those offers and promotions. Under the district court's reasoning, the Securities Act of 1933 regulates a video about digital assets uploaded to YouTube by a Yemeni villager who has never set foot in the western hemisphere, at least if a handful of viewers are American, because YouTube is "available" and "based" in the United States. *Balina*, 2024 WL 2332965, at *6. That reasoning fails to "'ensure that the Judiciary does not erroneously adopt an interpretation … that carries foreign policy consequences not clearly intended by the political branches.'" *Vasquez*, 899 F.3d at 373.

Sales. Even as to sales of digital assets, the district court broke from Supreme Court precedent. It held that step two of the extraterritoriality framework was satisfied as to online sales of digital assets from a foreign territory. It did so because a significant *minority* of the buyers (four-to-nine out of 24) were in the United States when they joined a pool that was a prerequisite to completing the online sale. *Balina*, 2024 WL 2332965, at *6-*8. Even for those transactions, the court held it sufficient that one party was in America, even though all of the other relevant conduct occurred overseas.

The district court reached this conclusion by misapplying an out-of-circuit test that asks where "irrevocable liability" attached. Under that test, the Second Circuit determines whether a transaction is domestic based on whether irrevocable liability was incurred within the United States. *See Absolute Activist Value Master Fund Ltd. v. Ficeto*, 677 F.3d 60, 68 (2d Cir. 2012). Irrevocable liability refers to "the point at which the

parties become irrevocably bound." *Id.* Here, the district court held that irrevocable liability attached in America when a minority of investors opted into a pool from the United States, where that pool was later used to purchase the digital assets.

But those investors' decision to opt into the pool did not incur irrevocable liability. After those pool payments were made, the defendant told the investors that they still could revoke their participation. Per the SEC's own complaint, he told them: "Sending funds soon. Those that want to pull [out] please do so asap. We won't wait long." *Balina*, 2024 WL 2332965, at *2.[2] Only after that message did the defendant initiate a transaction to use funds from the pool to acquire the digital assets. Irrevocable liability attached—between the defendant, the investors, and the digital-asset issuer—only then. That action occurred entirely in Europe. *Id.* at *2-*3. At the earlier time that the district court identified, the potential investors could still "pull out" of their own accord, which made their action (by definition) revocable. *See Revocable*, Black's Law Dictionary (12th ed. 2024) ("capable of being canceled or withdrawn").

Indeed, the Second Circuit long held that, under *Morrison* and *Absolute Activist*, "the mere placement of a buy order in the United States for the purchase of foreign securities on a foreign exchange" is insufficient to "allege that a purchaser incurred irrevocable liability in the United States, such that the U.S. securities laws govern the purchase of those securities." *City of Pontiac Policemen's and Firemen's Ret. Sys. v. UBS AG*,

[2] The bracketed addition is drawn from quoted language in the SEC's complaint omitted from the district court's otherwise identical quotation. *See* Compl. ¶68; ROA 741 (showing the bracketed addition in the defendant's original message).

752 F.3d 173, 181 (2d Cir. 2014). That conclusion follows from the commonsense principle that "'a purchaser's citizenship or residency does not affect where a transaction occurs.'" *Id.* (quoting *Absolute Activist*, 677 F.3d at 69 (cleaned up)).

Focusing on the transaction's formal location rather than the buyer's citizenship or residency makes sense. After all, *Morrison* held that both the Securities Act and the Exchange Act "focus on domestic transactions," not domestic purchasers. 561 U.S. at 268. The mere fact that a buyer lives in the United States when he places an order is not "'conduct relevant to the [Securities Act's] focus.'" *Abitron*, 600 U.S. at 418, Thus, "'if the [securities transaction] occurred in another country, then the case involves an impermissible extraterritorial application regardless of any other conduct that occurred in U.S. territory.'" *Id.* (quoting *WesternGeco*, 585 U.S. at 414)).

And as the Second Circuit has also explained, even if the transactions were domestic, the presumption against extraterritoriality applies if they are outweighed by "predominantly" foreign conduct. *Parkcentral*, 763 F.3d at 216. If any case satisfied that standard, it would be this one. Here, any domestic transaction would have been outweighed by "predominantly" foreign conduct because the defendant's actions that effected the transactions were all in a foreign country, the digital asset company was based in a foreign country, the defendant's events related to promoting the digital asset were in a foreign country, the defendant disclaimed application to U.S. investors, and the defendant did nothing to specially target Americans to contribute to the pool. *See Balina*, 2024 WL 2332965, at *2-*4. The district court's position could not be reconciled

with *Parkcentral*, so it took the position that *Parkcentral* is wrong. *Id.* at *8. But *Parkcentral*'s demand that the domestic conduct predominate reflects the Supreme Court's repeated admonition that, though "it is a rare case of prohibited extraterritorial application that lacks all contact with the territory of the United States," merely "some" domestic contact is insufficient to overcome the presumption against extraterritoriality. *Morrison*, 561 U.S. at 266.

* * *

Tellingly, the district court resolved its analysis by reasoning that "finding that a domestic transaction occurred here is consistent with public policy." *Balina*, 2024 WL 2332965, at *8. That functionalist, public-policy-driven analysis is exactly what the Supreme Court has tried to get away from. *See Morrison*, 561 U.S. at 259-61 (criticizing courts' consideration of "matters of policy" in the extraterritoriality context). Together, the district court's errors in this case effectively "negate the presumption against extraterritoriality." *Abitron*, 600 U.S. at 425. They cabin *Morrison* to its facts, revitalize the rejected conduct-and-effects test, and flip the majority and minority opinions in *Abitron*. *See generally id.* These fundamental errors warrant reversal.

II. The district court's decision will cause hardship for the digital asset economy and instability in world affairs.

If affirmed, the district court's ruling would wreak havoc. It would permit the SEC to exercise regulatory jurisdiction over almost any foreign offer or promotion made using a social media platform (nearly all of which are at least "available in" the United States, *Balina*, 2024 WL 2332965, at *6) so long as the government can show a

handful of potential American investors. Even as to sales, the district court's reasoning would find a domestic application any time a minority of potential investors submits funds online from the United States and later follows through, even if the sender never sets foot in or transmits anything physical into the United States. As a result, every foreign project with a single potential American investor, targeted or otherwise, would find itself subject to SEC regulation. That implication will be especially hard on the digital asset industry, which the SEC has targeted with repeated overzealous enforcement actions. *See, e.g.*, *SEC v. Digit. Licensing Inc.*, 2024 WL 1157832, at *17 n. 284, *32 (D. Utah Mar. 18).

This new approach to extraterritoriality would interfere with international comity. The presumption against extraterritoriality is intended to "preven[t] 'unintended clashes between our laws and those of other nations which could result in international discord.'" *WesternGeco*, 585 U.S. at 412-13 (quoting *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991)). The Supreme Court has especially sought to avoid a foreign application of the securities laws that would cause "interference with foreign securities regulation." *Morrison*, 561 U.S. at 269. Of course, "foreign countries regulate … securities transactions occurring within their territorial jurisdiction" too. *Id.* And of course here, the defendant's offers, promotions, and sales were subject to the securities laws of the countries where they occurred, like those of Europe. It is to everyone's mutual benefit to avoid making conflicting demands on people like the defendant here. As *Morrison* explained, "the regulation of other countries often differs from ours as to

what constitutes fraud, what disclosures must be made, what damages are recoverable, what discovery is available in litigation, what individual actions may be joined in a single suit, what attorney's fees are recoverable, and many other matters." *Id.* When the SEC makes conflicting demands in these circumstances, it may well be interpreted as an affront to other nations' enforcement of their laws. *See id.* (discussing amicus briefs of foreign nations expressing concerns about "interference with foreign securities regulation that application of [securities laws] abroad would produce").

The district court's decision could also open the door for foreign countries to impose *their regulations* on conduct that occurs in America. The district court's ruling may well invite a cycle of tit-for-tat retaliation, as regulators around the world decide that, if the SEC is flexing its extraterritorial muscles, they might as well do the same. They will not long play by rules that put them at a special disadvantage. And if they do seek to adopt the district court's rule for themselves, then every offer or promotion of securities in the United States will be subject to those countries' securities laws too—at least if they have social media and potential investors, which most countries do. Complying with such a morass of overlapping laws is itself enough to crush most businesses. And in many cases, the substance of those laws will harm American industry and innovation too.

The district court's approach will also stifle innovation. To avoid the risk of an SEC enforcement action, innovators will be forced to attempt novel constructs to avoid touching the United States. Those interested in building and promoting foreign

blockchain projects (or other offerings that the SEC views as securities) will be obliged to proactively wall themselves off from even a tangential connection with the United States. So far as it is even possible in the modern digital world, doing so will impose severe costs on a blockchain community that would find itself increasingly fractionalized. But it is unclear how one could effectively promote any investment project without using channels of communication at least "available in" the United States and thus "targeting United States investors," *Balina*, 2024 WL 2332965, at *6-*8, so these efforts may well prove futile anyway and everyone on earth will have to accept that they are subject to the SEC's jurisdiction.

The district court's errors are especially concerning to the Association because the SEC has been hostile to digital asset development. As its own Commissioners have lamented, the SEC has adopted a "scorched earth" approach to digital asset regulation that has put industry participants out of business or, in many cases, forced them offshore. Peirce, *Overdue: Statement of Dissent on LBRY*, SEC.gov (Oct. 27, 2023), perma.cc/KM65-3PGS. It has taken the extraordinarily broad view that most digital asset transactions are unregistered securities sales. Comm'r Gensler, *Speech: Kennedy and Crypto*, SEC.gov (Sept. 8, 2022), perma.cc/E3D5-QUBH; *see also* Peirce, *Outdated: Remarks Before the Digital Assets at Duke Conference*, SEC.gov (Jan. 20, 2023), perma.cc/6PU7-HQXM. Its aggressive position is inconsistent with its own previous position and with the securities laws of foreign jurisdictions. Specifically, the SEC has treated nearly all digital asset transactions as (unregistered) securities and brought a tidal

wave of enforcement actions against the digital asset industry, many of which it has lost, thereby adding to the confusion and uncertainty plaguing the space. *See SEC Nearly Doubles Size of Enforcement's Crypto Assets and Cyber Unit*, SEC.gov (May 3, 2022), perma.cc/YAQ9-U2DV; *see, e.g.*, *SEC v. Coinbase*, No. 1:23-cv-04738 (S.D.N.Y.).

The SEC has thereby created a "hostile regulatory environment" that is "prevent[ing] this technology from achieving … its full potential" in America. *Letter from Reps. Emmer & McHenry to Chair Gensler* (Sept. 17, 2024), perma.cc/ZWM8-YFQA; *see also* Schulp, *Dazed and Confused: Breaking Down the SEC's Politicized Approach to Digital Assets*, Cato Inst. (Sept. 17, 2024), perma.cc/WA9M-A7BM. Courts have described the SEC's tactics in its war on digital assets as a "gross abuse of the power entrusted to [the SEC] by Congress." *Digit. Licensing*, 2024 WL 1157832, at *32; *see also id.* at *17 n.284. Congress has criticized the SEC sharply for its approach to digital assets. *E.g.*, Singh, *Congressman Torres Calls for Investigation into SEC Over its Approach to Crypto*, Yahoo! Finance (Jul. 14, 2023), perma.cc/XPV8-GDP7; Amicus Curiae Brief of United States Senator Cynthia M. Lummis, *SEC v. Coinbase*, No. 1:23-cv-04738, ECF No. 53 at 9 (S.D.N.Y. Aug. 11, 2023); Shapero, *Republican Senators Slam SEC over 'Deeply Troubling' Conduct in Crypto Case*, The Hill (Feb. 8, 2024), perma.cc/98R9-7XXG; *Letter from Chairman McHenry et al. to Chair Gensler* (Apr. 18, 2023), perma.cc/KN6P-RF29. But by extending the SEC's jurisdiction to offers and promotions that occur abroad, the district court has extrapolated all of those harmful policies to the rest of the world and created inconsistencies with the laws of those countries that do not treat most digital assets as

securities. If upheld, the district court's holding will make it impossible for developers anywhere in the world to avoid the SEC's aggressive regulatory approach and its radical view that most digital asset transactions are unregistered securities offerings.

None of this is what Congress intended when it enacted the Securities Act ninety years ago. The Supreme Court recently reiterated that Congress must speak "clearly" to authorize executive action of vast "'economic and political significance.'" *Biden v. Nebraska*, 143 S. Ct. 2355, 2373 (2023). That canon of construction channels lawmaking, with all its attendant interest balancing and tradeoffs, to those best suited for it, the people's elected representatives. The presumption against extraterritoriality vindicates similar values of stability and democratic accountability. *Cf. Vasquez*, 899 F.3d at 373; *RJR Nabisco v. European Cmty.*, 579 U.S. 325, 335-36 (2016); *WesternGeco*, 585 U.S. at 412-13. This Court should hold the SEC to the law that Congress wrote until Congress decides to change it. And that law does not apply to a defendant's conduct outside the United States.

* * *

By interpreting the Securities Act to govern foreign conduct with only a passing connection to domestic activity, the SEC encroached on Congress's prerogative to control the extraterritorial reach of U.S. securities law. It ignored *Morrison*'s and *Abitron*'s conduct-focused, bright line rule in favor of inappropriate considerations that make producing a YouTube video from foreign soil sufficient to be subject to regulation based on unintended domestic effects. Its departures from precedent may have been

motivated by a desire to protect American investors, but such preemptive lawmaking is not a judicial function. If the district court's decision is upheld, parties will be obliged to walk on eggshells, beholden to the caprice of a revived "effects" or "protection" test under which merely hitting "Tweet" can "conclusively establish" domesticity if a handful of Americans happen upon the post.

Congress will also suffer, as the executive and judicial branches run roughshod over its legislative prerogative in their zeal to solve a problem yet unaddressed by the people's elected representatives. Congress will be less likely to address problems legislatively if its solutions get replaced by the other branches anyway. And Americans may need that legislative capacity sooner rather than later, as the SEC's sweeping interpretation of its own extraterritorial regulatory jurisdiction is more likely to produce new international problems requiring congressional attention than it is to resolve perceived threats from actors like the defendant here. Faced with the prospect of an overreaching American regulatory regime, major international players will be emboldened to respond in kind. And above all, the district court's decision allows one branch of the federal government to encroach on the constitutional role of another, a result that negatively impacts all Americans.

All of this can be avoided by restoring the framework from *Morrison* and *Abitron* and reversing the district court's decision here.

CONCLUSION

This Court should reverse.

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Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with Fed. R. App. P. 29(a)(5) and Circuit Rule 29.3 because it contains 6,322 words, excluding the parts that can be excluded. This brief also complies with Fed. R. App. P. 32(a)(5)-(6) and Circuit Rule 32.1 because it has been prepared in a proportionally spaced face using Microsoft Word 2016 in 14-point Garamond font.

Dated: January 9, 2025 */s/ Thomas R. McCarthy*

CERTIFICATE OF SERVICE

I e-filed this brief with the Court, which will email everyone requiring notice.

Dated: January 9, 2025 */s/ Thomas R. McCarthy*